No. 11750

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE 727, an unincorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a corporation,

Appellees.

BRIEF OF APPELLEE LOCKHEED AIRCRAFT CORPORATION.

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BRIEF OF APPELLEE LOCKHEED AIRCRAFT CORPORATION.

Statement of the Case.

The present action involves an adjudication of the seniority rights of Veterans James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, petitioners and appellees herein under Sections 8(b) and 8(c) of the Selective Training and Service Act of 1940, 54 Stat. 890 (1940), as amended 58 Stat. 799 (1944) (50 U. S. C. A. App. Sec. 301, *et seq.*) and Section 7 of the Service Extension Act of 1941, as amended (50 U. S. C. A. App. Sec. 357). The jurisdiction of the District Court below is established by the provisions of Section 8(e) (50 U. S. C. A. App. Sec. 308(e)) of the former Act, and the jurisdiction here

rests on Judicial Code, Section 128(a)—First, 28 U. S. C. A. App. Sec. 225(a)—First.

The facts pertinent to the issues raised by this appeal are contained in the allegations of the original petition of these Veterans[1] [Tr. pp. 2-88] which are largely admitted by the answers of appellee Lockheed[1] [Tr. pp. 89-91] and appellant Union[1] [Tr. pp. 92-96] and the stipulation of facts submitted by the parties to the lower court. [Tr. pp. 97-107.]

It is not controverted that each of the Veterans was, prior to his entrance into the armed forces, employed by Lockheed, nor that each of the Veterans served honorably in the service of his country, received an honorable discharge and applied for reemployment and was reemployed by Lockheed in his former position—James L. Campbell on November 27, 1945; Mitchell B. Joplin on December 10, 1945; and Malcolm E. Kirk on March 7, 1946. It was further agreed in the stipulation, above referred to, that the seniority[2] of each of the Veterans with Lockheed

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[1]For purposes of convenience and in order to avoid any confusion in designating the various parties herein, the petitioners and appellees, James L. Campbell, Mitchell B. Joplin and Malcolm E. Kirk, will hereinafter be referred to as "the Veterans"; respondent and appellee, Lockheed Aircraft Corporation, will be referred to as "Lockheed"; and intervenor and appellant, Aeronautical Industrial District Lodge 727, will be referred to as "the Union."

[2]The collective bargaining agreement between Lockheed and the Union which was in effect at the time the Veterans entered the armed forces provided in Section 1 of Article III thereof that, "Six months after an employee is hired his seniority shall be retroactive to the date of his hiring. . . ." [Tr. p. 22.] Section 1 of Article IV of the collective bargaining agreement dated June 4, 1945, which was executed while the Veterans were serving in the armed forces, states, "Seniority shall be the relative status of employees in respect to length of service with the Company, . . ." [Tr. p. 58.]

is properly computed from the respective dates on which they were first employed by Lockheed, to wit: James L. Campbell, August 17, 1942; Mitchell B. Joplin, April 19, 1943; and Malcolm E. Kirk, August 5, 1942.

Within the period of a year following their reemployment, however, it became necessary for Lockheed to conduct a general layoff in the field and service mechanic occupation and in the course thereof Veterans Campbell and Kirk were laid off on June 21, 1946, and Veteran Joplin was laid off on June 24, 1946, although on each of said dates Lockheed retained in its active employ a non-veteran Union Chairman in the field and service mechanic occupation with less seniority than any of the Veterans. The retention of a non-veteran Union Chairman with less seniority than any one of the Veterans resulted from the application of the layoff procedure set forth in Sections 3(A) and 3(D), Article IV of the collective bargaining agreement dated June 4, 1945, (hereinafter for convenience referred to as the "1945 Agreement") [Tr. pp. 60-61] which procedure radically changed and modified, from a seniority standpoint, the layoff procedure set forth in the collective bargaining agreement in effect when the Veterans were inducted into the armed forces.

Sections 3(A) and 3(D) of Article IV of the 1945 Agreement provide as follows:

> "(A) General Layoff Procedure. Layoffs shall be made in order of Company-wide seniority applied by occupation where ability, skill and efficiency are substantially equal. However, in the case of employees with four years' or more seniority, the Company may, in its discretion, retain them in order of their Company-wide seniority, regardless of occupation,

where ability, skill and efficiency are substantially equal. Any claim of unjust discrimination in the exercise of such discretion may be taken up as a grievance. Employees who have not acquired seniority rights may be laid off without regard to relative length of service.

"The word 'occupation' as used herein, includes all grades and leadmen within an occupation."

"(D) Top Seniority for Union Chairmen for Purpose of Layoffs. For the purpose of applying the Temporary and General Layoff procedure, Union Chairmen who have acquired seniority shall be deemed to have top seniority so long as they remain Chairmen. If the application of the General Layoff Procedure will result in the retention of more of such Chairmen in a group or department than are provided for in Article II, Section 2 of this Agreement, the Company shall prepare and furnish to the Union a list of all Chairmen in the locations where the surplus exists. The Union shall upon request of the Company promptly designate the Chairmen who are to remain in that capacity, and the Chairmen not to be retained as Chairmen shall be governed by the seniority rules applicable to the layoff of other employees. During a Temporary Layoff and during the period between the first and second steps in an Emergency Reduction of the Working Force, the terms of office of laid-off Union Chairmen shall be deemed to continue." [Tr. pp. 60-61.]

Upon learning they had been laid off prior to the expiration of their first year of reemployment and that pursuant to the provisions of Section 3(D) of the 1945 Agreement, Lockheed had retained in its active employment a non-veteran Union Chairman with less seniority

in the field and service mechanic occupation, each of the Veterans complained to Lockheed through the United States Attorney that they had been denied their rights under the Selective Training and Service Act of 1940, as amended, and demanded that they be reinstated for the balance of their reemployment year and compensated for the time they had been laid off.

The Veterans' contention that their reemployment rights had been violated by their being laid off under these circumstances was predicated upon the premise, and it is not disputed by the parties hereto that if Lockheed had conducted the layoff in accordance with the terms of the collective bargaining agreement of September 15, 1941, (hereinafter for convenience referred to as the "1941 Agreement") [Tr. pp. 11-41] which was in effect between the Union and Lockheed at the time they had terminated their employment to enter the armed forces, the layoff would have been conducted primarily on the basis of seniority and that Lockheed could not, under the 1941 Agreement, have given preference in the layoff to a non-veteran Union Chairman with less seniority.[3] It was further contended by the Veterans that Sections 3(A) and 3(D) of Article IV of the 1945 Agreement, which was executed by Lockheed and the Union subsequent to the Veterans' entrance into the armed forces and prior to their reemployment, deprived them of their reemployment rights under Sections 8(b) and 8(c) of the Selective Training and Service Act, as amended, and in turn vio-

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[3]It is agreed by all parties to the within action that the knowledge, training, ability, skill and efficiency of each of the Veterans was substantially equal to that of the non-veteran Union Chairman retained and that each of the Veterans was capable of performing the work of said non-veteran Union Chairman. [Tr. p. 106.]

lated the terms of Section 6 of Article IV of the 1945 Agreement.[4]

Section 5 of Article IV of the 1941 Agreement, which was in effect at the time the Veterans entered the armed forces and which section defined the procedure to be followed in the event of a layoff, provided so far as pertinent hereto as follows:

> "In case of a slack in production, layoffs are to be made primarily on the basis of the principle of seniority. Due consideration will be given, however, to (a) knowledge, training, ability, skill and efficiency, and (b) deportment record and other factors . . ." [Tr. pp. 27-28.]

These contentions advanced by the Veterans in demanding reinstatement and reimbursement for loss of wages during the period of their layoff placed upon Lockheed the burden of determining whether the provisions of Section 3(D) of the 1945 Agreement, granting Union Chairmen top seniority in the case of a general layoff regardless of their actual seniority, contravened the rights of the Veterans under Section 6, Article IV [Tr. p. 63], of that Agreement and, as well, the Selective Training and Service Act of 1940, as amended. The importance of the decision with which Lockheed was faced cannot be minimized for Lockheed had reemployed in excess of 6000 veterans during the preceding two years and was at that

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[4]Section 6 of Article IV of the 1945 Agreement provided as follows: "Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be re-employed by the Company in accordance with the provisions of the Selective Training and Service Act of 1940, as such Act may be amended." [Tr. p. 63.]

time faced with the necessity of making major reductions in its working forces. Lockheed's dilemma was therefore apparent for in the event it complied with the provisions of Section 3(D) of the 1945 Agreement and granted Union Chairmen top or "super seniority" when conducting its general layoffs, Lockheed would be faced with a possible action by each and every veteran laid off in an occupation in which a veteran or non-veteran, Union Chairman, with less seniority was retained, if the veteran entered the armed forces subsequent to the date of the 1941 Agreement and prior to the date of the 1945 Agreement, and had not completed his year of reemployment. Conversely, if Lockheed concurred in the position advanced by the Veterans, it subjected itself to possible grievances and actions by the Union for failure to comply with the 1945 Agreement. The reality of this dilemma is indicated by the present action and the intervention of the Union herein.

Lockheed eventually concluded, after carefully reviewing all available decisions and opinions on the question of a veteran's reemployment rights, that the Veterans herein were correct in their interpretation of the Selective Training and Service Act of 1940, as amended, and accordingly, recalled each of the Veterans herein and reinstated him in his respective position—James L. Campbell and Mitchell B. Joplin on July 15, 1946, and Malcolm E. Kirk on July 16, 1946. [Tr. p. 107.] Since that time Lockheed has consistently followed the policy of employing and retaining in their respective occupations for the full period of their reemployment year all veterans who are inducted

or enlisted in the military service while the 1941 Agreement was in effect when the occupational seniority rosters disclose that there is, in the veteran's occupation, a Union Chairman with less seniority than the veteran's. However, in order to avoid a possible double monetary liability which might result to Lockheed if it reimbursed the Veterans and its interpretation of the Act was determined to be incorrect, and it being well established that an employer may not file a declaratory relief action to secure an interpretation of this Act, Lockheed denied the claims of the Veterans for reimbursement for loss of wages they sustained during said layoff, and, as a result thereof, the present action was instituted. Upon the intervention of the Union in the action [Tr. pp. 92-96], the Union and the Veterans became the true parties of interest and Lockheed throughout the proceedings has taken the position that it is merely seeking a legal decision of the issues involved and would be governed by such a decision. Judgment was entered by the trial court in favor of the Veterans and against Lockheed, and the Union has filed this appeal.

The decision of the lower court is consistent with the policy followed by Lockheed since the reinstatement of the Veterans here involved, and Lockheed feels that such a decision is correct as a matter of law. In the light of these circumstances, although Lockheed has been named as an appellee, it deems its present duty in this appeal to be in reality that of *amicus curiae* and in this brief approaches the issues from such a standpoint.

SUMMARY OF ARGUMENT.

I.

Seniority Rights of the Veterans Exist Not Solely Because of Collective Bargaining Agreements but Primarily by Virtue of the Selective Training and Service Act.

II.

Section 3(D), Article IV of the 1945 Agreement Conflicts with and Detracts from the Statutory Seniority Rights of the Veterans and is Therefore Void as to the Veterans.

III.

Section 3(D), Article IV of the 1945 Agreement Discriminates against the Veterans and is Therefore Admittedly Void as to Them.

ARGUMENT.

I.

Seniority Rights of the Veterans Exist Not Solely Because of Collective Bargaining Agreements But Primarily by Virtue of the Selective Training and Service Act.

Any answer to the arguments advanced by the Union in its Opening Brief must necessarily be prefaced by a clarification of a contradiction appearing in the first two points of the Union's argument. In the first section of its argument (although entitled "ALL SENIORITY RIGHTS ARE BASED ON CONTRACTUAL RIGHTS ONLY") the Union states that seniority rights exist by virtue of contractual agreement *or statutes*. After thus properly stating the law with respect to the manner in which seniority rights are created, however, the Union, in complete disregard of its own proper statement of the law, concludes that "the only rights of the petitioners and appellees to seniority rights are predicated upon the collective bargaining agreement executed between the Union and Lockheed," and on such a conclusion predicates its following argument that the seniority rights of the veterans may be decreased or changed by the mere process of collective bargaining. To state that the veterans' seniority rights exist solely because of the collective bargaining agreements here involved, not only begs the very question at issue, but is obviously contrary to the very terms of those collective bargaining agreements and, as well, to establish canons of the law.

Realizing full well that the Selective Training and Service Act of 1940, as amended, guaranteed veterans certain seniority rights and that said rights were superior to, and superseded, any provisions of a collective bargaining agreement to the contrary, both the Union and Lock-

heed deemed it imperative that provision be made in their collective bargaining agreements to assure those rights to the veteran. Accordingly, in Section 6, Article IV of the 1945 Agreement the Union and Lockheed recognized specifically the statutory seniority rights (as well as any other rights granted by the Act) of the veterans and provided that in so far as those rights were concerned, the Act, and not the balance of the contract provisions, should govern. Said Section of the 1945 Agreement provides as follows:

> "Employees (other than temporary employees) who shall have left the employment of the Company for the purpose of entering the armed forces of the United States, shall be re-employed by the Company in accordance with the provisions of the Selective Training and Service Act of 1940, as such Act may be amended." [Tr. p. 63.]

Indeed, the seniority rights of veterans granted by the Act were recognized by the Union in the 1941 Agreement, for in Section 5, Article IV of said Agreement it is provided that an employee entering the military service

> "shall be granted leave of absence covering the period of time in which he may be thus engaged in Government service without loss of seniority rights. Upon the termination of such Government service, if within forty-five (45) days[5] such employees shall request re-employment and if the employees are physically and mentally able to do the work available, *the Company agrees to re-employ such persons in preference to all other persons in their occupations with less seniority.*" [Tr. pp. 27-28.] (Italics supplied.)

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[5]The forty-five (45) day period within which the veteran must make application to be entitled to reemployment was by an amendment in 1944, 58 Stat. 798, extended to ninety (90) days.

Thus, by specific provisions of the very collective bargaining agreements upon which the Union predicates its case, it is established and agreed to by the Union that seniority rights of veterans exist not solely because of the terms of such agreements, but, as well, by reason of the provisions of the Selective Training and Service Act of 1940, as amended.

Furthermore, and even thuogh said collevtice bargaining agreements had not, by their very terms, recognized the statutory guarantees afforded the veterans with respect to seniority rights, it is too well established to admit of question that said statutory guarantees would prevail notwithstanding the absence of such provisions from a collective bargaining agreement or the inclusion in such an agreement of provisions in conflict with the Act.

Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275, 66 S. Ct. 1105, 90 L. Ed. 963 (1946);

Trailmobile Co. v. Whirls, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 939 (1947);

Newman v. High-Hat Elkhorn Mining Co., 11 C. C. H. Labor Cases, p. 69826, No. 63,358 (D. C., E. D., Ky., 1946);

Orban v. Reynolds Metals Co., 11 C. C. H. Labor Cases, p. 69924, No. 63,395 (D. C., N. J., 1946).

Indeed, the very language of the *Fishgold* case, *supra,* quoted by the Union in a subsequent portion of its Opening Brief (p. 7) establishes beyond question the fact that certain rights of the veteran exist by reason of the Selective Training and Service Act of 1940, as amended, for at page 284, Justice Douglas states:

"These guarantees are contained in Section 8 of the Act and extend to a veteran, honorably discharged

and still qualified to perform the duties of his old position. (1) He has a stated period of time in which to apply for reemployment. 8(b). He is not pressed for a decision immediately on his discharge but has the opportunity to make plans for the future and readjust himself to civilian life. (2) He must be restored to his former position 'or to a position of like seniority, status, and pay.' 8 (b) (A) (B). *He is thus protected against receiving a job inferior to that which he had before entering the armed services.* (3) He shall be 'restored without loss of seniority' and be considered 'as having been on furlough or leave of absence' during the period of his service for his country, with all of the insurance and other benefits accruing to employees on furlough or leave of absence." (Italics supplied.)

It is submitted, therefore, that the very provisions of the collective bargaining agreements here in question, the decisions of our highest court and the admission of the Union contained in its Opening Brief establish beyond controversy that contrary to the contentions of the Union, seniority rights of veterans exist not merely by reason of collective bargaining agreements, but, as well, by virtue of the provisions of the Selective Training and Service Act of 1940, as amended, and that in the event of a conflict, the statutory rights must prevail. Accordingly, the decision on the issues presented by this appeal must turn upon a determination as to whether the provisions of the 1945 Agreement, and more particularly Section 3(D) thereof, conflict with, or detract from, the seniority rights guaranteed the Veterans by the Selective Training and Service Act of 1940, as amended.

II.

Section 3(D), Article IV of the 1945 Agreement Conflicts With and Detracts From the Statutory Seniority Rights of the Veterans and Is Therefore Void as to the Veterans.

The provisions of the Selective Training and Service Act of 1940, as amended, pertinent to the issue here involved, are as follows:

> "Sec. 8(b) In the case of any person who, in order to perform such training and service (in the armed forces), has left or leaves a position, other than a temporary position in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position and (3) makes application for reemployment within ninety days * * * (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
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> * * * * * * * *
>
> "(c) Any person who is restored to a position in accordance with the provisions of paragraph * * * (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration."

The circumstances giving rise to the enactment of this legislation are only too fresh in the memory of this nation to here warrant any prolonged dissertation of the necessity for or purpose of this legislation. It is equally clear that Congress thereby intended to afford the veterans an "extraordinary statutory security" and that this legislation must be "liberally construed for the benefit of those who left private life to serve their country in its hour of great need." (*Fishgold v. Sullivan Drydock Corporation, supra,* at page 285).

The very language of the Act makes it plain that the seniority rights of the veterans were uppermost in the minds of Congress when it legislatively extended this "extraordinary statutory security" to them. Thus, the Act provides that the veteran is entitled to be restored "to such position or to a position of like *seniority,* status and pay" (8(b)); and he "shall be so restored without loss of *seniority*" (8(c)). It is equally plain and requires no list of court decisions to establish that in the Act Congress used words which have acquired a meaning in industry and that the word "position" must be construed to mean not merely the physical job in question, but as well, all the incidences thereof, including seniority and the rights attributable to or arising out of that seniority (see: *Mikczynski v. North American Aviation Inc.,* 12 C. C. H. Labor Cases, p. 71185, No. 63,814 (D. C., S. D., Calif., 1947). As stated by the Supreme Court in *Trailmobile Co. v. Whirls, supra* (footnote 23, page 53):

> "The position to which an employee must be restored is either the position previously held or 'a position of like seniority, status, and pay'. See note 18. It is thus recognized that part of the restored 'position' is the seniority accrued prior to service in the

armed forces and under the *Fishgold* case, during service. *'Seniority' is part of 'position' and therefore, when the Act states in subsection (c) that the veteran may not be discharged 'from such position' it means both from the job itself and from the seniority which is part of the job."*

Since seniority and the rights attributable thereto are an integral part or incidence of the "position" to which the veteran must be restored, the intent of Congress with respect to seniority and seniority rights attributable thereto and the extent of the "extraordinary statutory security" afforded the veterans with respect to their seniority rights is made quite obvious by substituting the words "seniority rights" for the word "position" wherever the latter appears in that portion of the language of the Act with which we are here concerned. With such a substitution the Act would read:

> "Sec. 8(b) In the case of any person who, in order to perform such training and service (in the armed forces), has left or leaves *'seniority rights'* * * * (B) if such *'seniority rights'* (were) in the employ of a private employer, such employer shall restore such person to *such 'seniority rights'*
>
> * * * * * * * *
>
> "8(c) Any person who is restored to *'seniority rights'* in accordance with the provisions of paragraph * * * (B) * * * shall not be discharged from *such 'seniority rights'* without cause within one year after such restoration."

In the light of this outright edict of Congress as to the "extraordinary statutory security" to be enjoyed by the veteran, it is clear that in the instant case the seniority rights of the Veterans at the time of their application for

reemployment and throughout their reemployment year are those former seniority rights to which they were entitled at the time of their induction, including the right to insist, under Section 5, Article III of the 1941 Agreement that a general layoff be made primarily on the basis of seniority and not upon the basis of some artificial seniority such as that created by Section 3(D), Article IV of the 1945 Agreement in favor of Union Chairmen.

The Union has contended in its Opening Brief (pp. 6-10) that notwithstanding the unambiguous language of the Act and contrary to the statement of the Supreme Court that the veteran is afforded an "extraordinary statutory security" by the Act, the Veterans are bound, upon restoration to their former positions and during the year of their reemployment, by Section 3(D), Article IV of the 1945 Agreement executed during their absence in military service, which reduced their seniority rights and nullified their statutory seniority right security. Such a contention is based upon the theory that the only seniority rights afforded the veteran by the Act are those to which he would have been entitled had he remained continuously employed on the job during the period he served in the military service. In support of its contention, the Union relies upon the case of *Gauweiler v. Elastic Stop Nut Corp.*, 162 F. (2d) 448 (C. C. A. 3), and associated cases[6] and attempts to secure additional justification there-

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[6]On the same day the Third Circuit Court of Appeals reversed the District Court of New Jersey in the *Gauweiler* case, it similarly decided three other cases involving like questions, *viz., Koury v. Elastic Stop Nut Corp.*, 162 F. (2d) 544; *DiMaggio v. Elastic Stop Nut Corp.*, 162 F. (2d) 546; and *Payne v. Wright Aeronautical Corp.*, 162 F. (2d) 549. For purposes of convenience, all four of these cases will hereafter collectively be referred to as the *Gauweiler* cases.

for by segregating certain language from the context of the decision of the Supreme Court in the *Fishgold* case.

It is submitted that the *Gauweiler* cases are distinguishable upon their facts from the instant case; first, because there is no evidence in those cases that the collective bargaining agreements there considered specifically recognized the statutory seniority rights of the veterans as is here the case (see Section 5, Article IV of the 1941 Agreement [Tr. pp. 27-28] and Section 6, Article IV of the 1945 Agreement [Tr. p. 63]); and secondly, because it was established in the *Gauweiler* cases that "there was an utter impracticability of enforcing in the same plant two conflicting systems of seniority", whereas, in the instant case it was orally stipulated in the lower court:

> "That in the operation of the business of Lockheed, the defendant corporation has operated, first under the policy of complying with the contract granting Union Chairmen top seniority and applying that provision to veterans returning from the service; that, secondly, Lockheed has operated under the policy of employing and retaining in their employment veterans, and not considering that the provision of the contract giving Union Chairmen top seniority as binding upon those veterans and that the application of either policy has not proved inconvenient to the company" [Tr. pp. 125-126].

However, it is believed that even if the majority opinions in the *Gauweiler* cases are deemed to be predicated upon facts which are on all fours with those in this litigation established, such opinions are in direct conflict with the language of the Act and the interpretation placed thereon by the Supreme Court in the *Fishgold* and *Trailmobile* cases. In this connection it is interesting to note that the

lower court herein orally ruled in favor of the Veterans [Tr. pp. 117-120] on the basis of the *Trailmobile* case and the District Court decisions in the *Gauweiler* cases, which latter cases held void as to veterans a collective bargaining agreement, executed while the veterans were in the military service, containing a "top seniority" provision for Union Chairmen similar to that set forth in Section 3(D), Article IV of the 1945 Agreement. (See: *Gauweiler v. Elastic Stop Nut Corp.,* 69 Fed. Supp. 294 (D. C., N. J., 1946); *DiMaggio v. Elastic Stop Nut Corp.,* 11 C. C. H. Labor Cases p. 70072, No. 63,449 (D. C. N. J., 1946); *Koury v. Elastic Stop Nut Corp.,* 11 C. C. H. Labor Cases p. 70071, No. 63,448 (D. C., N. J., 1946); and *Payne v. Wright Aeronautical Corp.* (D. C., N. J., 1946, unreported).) Prior to the preparation and signing of the formal findings and judgment in the instant case, however, the Third Circuit Court of Appeals reversed the *Gauweiler* cases and upon a motion of the Union [Tr. pp. 108-110] the District Court reopened this matter for further argument. After hearing said reargument, however, and notwithstanding the opinions of the Third Circuit Court of Appeals in the *Gauweiler* cases, the District Court on the basis of the *Trailmobile* case reaffirmed its oral opinion formerly given, and awarded judgment in favor of the Veterans. Thus, before arriving at its decision in this case, the Court below had before it the only cases relied upon by the Union in its Opening Brief, and concluded that the *Gauweiler* cases were contrary to the intent of the Act as expressed by the Supreme Court in the *Trailmobile* case.

It is submitted that a careful analysis of the *Fishgold* and *Trailmobile* cases will establish the wisdom and validity of the judgment of the lower court.

The *Fishgold* case involved the sole question as to whether the Act afforded a veteran seeking reemployment a "super-seniority" which entitled him to reemployment preference over a non-veteran regardless of their respective actual seniorities. In other words, the court was asked to determine whether the Act granted the veteran a step-up or gain in seniority over that he had at the time he entered the armed forces. Both the Circuit Court of Appeals for the Second Circuit and the Supreme Court ruled that such was not the proper interpretation of the Act, and in their respective decisions appears certain language (quoted by the Union in its Opening Brief at pp. 7-9) which when removed from the context of those opinions would appear to sustain the Union's contentions in this litigation. However, when considered in the light of the sole issue before the Court, such language assumes a meaning completely foreign to the meaning attributed to it by the Union. Thus, when the Supreme Court states at page 286:

> "No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

and again when stating at page 288:

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. There is indeed no suggestion that Congress sought to sweep aside the seniority system.

> What it undertook to do was to give the veteran protection within the framework of the seniority system plus a guarantee against demotion or termination of the employment relationship without cause for a year,"

it is submitted that the Court has reference to the *seniority system in effect at the time* he entered the military service, and the Court is in effect stating that the Act did not create in favor of the veteran a seniority superior to that which he enjoyed under that system. And further when the Court states, "Thus, he does not step back on the seniority escalator at the point he stepped off. He steps back on the precise point he would have occupied had he kept his position continuously during the War", the Court is merely reaffirming the fact that the veteran is entitled to have credited to his *seniority* an amount of time equal to that which he spent in the military service. It seems only reasonable to assume that had the Supreme Court intended by the above-quoted language to rule, as the Union contends, that the veteran must, upon his reemployment, be governed by the seniority system in effect upon his return, the Court would have specifically so stated. At best, therefore, the language cited by the Union in support of its contention is, in view of the issue here before the Court, subject to the interpretation that the veteran must be restored to his former seniority rights; whereas, there is in the *Fishgold* and *Trailmobile* decisions language which unquestionably indicates that the Circuit Courts and the Supreme Court consider the Act as prohibiting the reduction of a veteran's seniority by the establishing of a new seniority system while the veteran is in the armed forces, and further establishes that the Union's interpretation of the above-quoted language is erroneous.

In the well-considered opinion of the Second Circuit Court in the *Fishgold* case, 154 F. (2d) 785, Judge Learned Hand completely answers the argument that the Act grants the veteran only those rights he would have had if he had remained on the job, for he states at page 788:

> "As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in service, there were likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, he was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. *How far that differed from his position had he remained actually at work, does not appear; but clearly the amendment presupposed that a difference there might be.*"

And again, at page 788, in indicating that the veteran, upon his reemployment, was entitled to something more seniority-wise than he would have received had he remained in his position during the time he was in miiltary service, Judge Hand states:

> "It seems to us that Congress used 'discharge' in this sense: *i. e.,* that the veteran was to be assured of his job for the same period—a year—for which he was to be drafted; *but that the job to which he was 'restored'—as that very word implies—was to be subject to the same conditions to which the old job had been subject, with only the exception that it should be better in so far as a leave of absence for the year might improve it.*"

And in affirming the judgment of the Second Circuit Court of Appeals in the *Fishgold* case, the Supreme Court, in unequivocal language stated at page 285:

> "*And no practice of employers or agreements between employers and union can cut down the service adjustment benefits which Congress has secured the veteran under the Act.* Our problem is to construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permit."

Finally, if any questions remained as to the proper meaning to be attributed to the language of the Supreme Court in the *Fishgold* case, its own review of that opinion in *Trailmobile Co. v. Whirls, supra,* removes any doubt as to that meaning. In the *Trailmobile* case, the veteran's seniority rights had been drastically reduced by a collective bargaining agreement setting up a different seniority system but the agreement was not executed until subsequent to the expiration of the veteran's reemployment year. In the course of its ruling that the Act did not protect for more than a year the veteran's seniority under the seniority system established by the agreement in effect at the time of his induction, the Supreme Court reviewed its former opinion in the *Fishgold* case and stated at page 58:

> "The Court held, indeed, that the Act did not give him standing to outrank nonveteran employees who had more than the amount of senority to which he was entitled to be and had been restored; in other words, that he was not given so-called 'superseniority'. But it also squarely held that he was given security not only against complete discharge, but also against demotion, for the statutory year. And demotion was held to mean impairment of 'other rights', including

his restored statutory seniority for that year. 'If within the statutory period, he is demoted, his status, which the Act was designed to protect, has been affected and the old employment relationship has been changed. He would then lose his old position and acquire an inferior one. He would within the meaning of §8(c) be "discharged from such position".' 328 U. S. at 286.

"That §8(c) applies to secure the protection of 'other rights' for at least the statutory year was therefore inherent in the rationalization of the *Fishgold* decision. To that extent at any rate the concluding clause was held applicable, not severable, concerning them. * * * While the reemployed veteran did not acquire 'superseniority', §8(c) gave him the restored standing for the minimum duration of the prescribed year.

"It is therefore clear that Congress did not confer the rights given as incidents of the restoration simply to leave the employer free to nullify them at will, once he had made it."

And once again, in the *Trailmobile* opinion the Supreme Court reiterated (page 58):

"For the statutory year indeed this meant that the restored rights could not be altered adversely by the usual processes of collective bargaining or of the employer's administration of general business policy."

It is submitted therefore that not only does the plain and unequivocal language of the Act itself, but as well, the interpretation of that language by the Supreme Court, establish that the "extraordinary statutory security" guaranteed the veteran by that Act includes the assurance that the veteran shall be entitled, at a minimum, to those

seniority rights which he enjoyed at the time of his induction. It follows therefore that Section 3(D), Article IV of the 1945 Agreement, which admittedly conflicts with and decreases those seniority rights, is void as to the Veterans here involved.

But not only does the Union rely upon a forced construction of the language in the *Fishgold* case. In order to conclude that the Veterans are bound by Section 3(D), Article IV of the 1945 Agreement, the Union assumes that had the Veterans remained in their positions during the time they served in the armed forces, the 1945 Agreement would have been written in identical terms. Had the three Veterans here involved been the only employees of Lockheed who entered the armed forces during the years 1941-1945, such an assumption might be warranted. However, the speculative nature of such an assumption becomes obvious when considered in the light of the vast number of Lockheed employees (in excess of 25,000) who entered the armed forces during that four-year period. As stated by Judge McLaughlin in his earnest and well-reasoned dissenting opinion in the *Gauweiler case* (p. 454):

> "Statements as to what Gauweiler's (the veteran) seniority rights would have been had he remained in his employment cannot be other than futile speculation and are in any event irrelevant, for the statute and the cases construing it tell us not what Gauweiler's status might have been if he had continued his civilian occupation but what he was entitled to as a returned veteran."

III.

Section 3(D), Article IV of the 1945 Agreement Discriminates Against the Veterans and Is Therefore Admittedly Void as to Them.

It is admitted by the Union, and clearly stated in the majority opinions in the *Gauweiler* cases, that provisions in a collective bargaining agreement, executed while the veterans were serving in the armed forces, which discriminated against them would not be binding upon the veterans. There can be no question but that Section 3(D), Article IV of the 1945 Agreement discriminated in favor of the Union Chairmen, for that was obviously the very purpose of that provision. However, it is contended by the Union that since Section 3(D), Article IV of the 1945 Agreement is applicable to veterans and non-veterans alike, the discrimination in favor of the Union Chairmen does not discriminate against the veterans.

An examination of the 1945 Agreement and more particularly Section 2, Article II thereof, describing the method of selection of Union Chairmen, discloses a factual discrimination against the Veterans, for by reason of their absence in the military service at the time of the selection of persons who were serving as Union Chairmen upon the Veterans' return, it is obvious that they had no opportunity to be appointed as a Senior Chairman or to vote for their Group Chairman.

Furthermore, the argument that Section 3(D), Article IV of the 1945 Agreement is not discriminatory as to the Veterans because that Section is applicable to veterans and non-veterans alike, ignores the fact that the Act granted the Veterans an "extraordinary statutory security", and that the application of Section 3(D), Article IV of the 1945 Agreement to the Veterans results in

their loss, not only of the rights under the 1941 Agreement they had in common with non-veterans, but as well, in their loss of their "extraordinary statutory security." To assure that Lockheed veterans, upon their reemployment, would not lose the benefits of this security, by reason of the balance of the provisions of the 1945 Agreement which might otherwise be discriminatory as to the veterans, both the Union and Lockheed agreed upon the incorporation of Section 6, Article IV into that Agreement.

Conclusion.

It is submitted that the judgment of the lower court should be affirmed and that a contrary action by this Court would be paramount to a ruling that the "extraordinary statutory security" afforded the Veterans by the Act could be nullified by collective bargaining agreements —a ruling which would be contrary to the legislative dictates of Congress and the unambiguous opinions of the Supreme Court.

Respectfully submitted,

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